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OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, PIRS

FROM: Associate General Counsel, Litigation Division

SUBJECT: Viacom International, Inc. v. FCC & USA, No. 95-1074. Filing of one new Petition for Review filed in the United States Court of Appeals for the District of Columbia Circuit.

DATE: February 27, 1995

Docket No(s). GEN Docket No. 90-314

File No (s).

This is to advise you that Viacom International, Inc., on January 30, 1995, filed Section 402(a) Petitions for Review of: In the Matter of the Commission's Rules to Establish New Personal Communications Services, FCC 94-304, released December 2, 1994.

Petitioner challenges a Commission order reaffirming its earlier action on various applications for broadband PCS pioneer's preferences.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this cases as No. 95-1074 and this case has been assigned to James M. Carr.

Daniel M. Armstrong

cc: General Counsel  
Office of Public Affairs  
Shepard's Citations

United States Court of Appeals  
For the District of Columbia Circuit

REC'D JAN 30 1995

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
For the District of Columbia Circuit

RON GARVIN

Viacom International Inc.,

Petitioner

v.

Federal Communications Commission  
and United States of America

Respondents

FILED JAN 30 1995

RON GARVIN

95-1074

No. 94-

PETITION FOR REVIEW

Viacom International Inc. ("Viacom"), pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and Rule 15 of the Federal Rules of Appellate Procedure, hereby submits this Petition for Review of the Memorandum Opinion and Order ("MO&O") of the Federal Communications Commission ("FCC") in General Docket No. 90-314, released December 2, 1994 (copy attached),<sup>1/</sup> insofar as necessary to obtain judicial review of the FCC's denial of Viacom's request for a pioneer's preference for a license to provide Personal Communications Services ("PCS") in the 2 GHz frequency band.

STATEMENT OF THE NATURE OF THE PROCEEDING

In its Third Report and Order in General Docket No. 90-314 released on February 3, 1994,<sup>2/</sup> the FCC denied Viacom's request

<sup>1/</sup> In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, General Docket No. 90-314, FCC 94-304 (released December 2, 1994).

<sup>2/</sup> In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 1337 (1994).

for a "pioneer's preference" for a 2 GHz PCS license. At the same time, the FCC granted a PCS pioneer's preference license to three other applicants, none of whose requests were mutually exclusive with that of Viacom. On March 3, 1994, Viacom petitioned this Court for review of the FCC's decision. Viacom International Inc. v. FCC, No. 94-1153 (D.C. Cir., filed March 3, 1994).

After this Court had consolidated Viacom's petition with a number of other appeals of the Third Report and Order and remanded the consolidated case to the FCC for further proceedings,<sup>3/</sup> the FCC issued a Memorandum Opinion and Order (the "Remand Order") in which the FCC did not address the issue which Viacom and others had raised individually on appeal, i.e., the FCC's failure to sufficiently explain why it had granted pioneer's preferences to some applicants but not to others.<sup>4/</sup> The FCC's limited ruling on remand thus required Viacom to resubmit its initial Petition for Review on August 30, 1994, to once again request review of the FCC's denial of Viacom's pioneer's preference request. Viacom International Inc. v. FCC, No. 94-1606 (filed August 30, 1994).

After consolidating Viacom's August 30 Petition for Review with a number of other similar pending cases, this Court issued an Order on September 27, 1994, in which it held that the FCC's

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<sup>3/</sup> Pacific Bell v. FCC, No. 94-1148, slip op. at 2 (D.C. Cir., filed July 26, 1994).

<sup>4/</sup> Memorandum Opinion and Order on Remand, 9 FCC Rcd 4055 (1994).

denial of PCS pioneer's preference requests was not properly before it, and that the issue remained pending before the FCC in petitions for reconsideration.<sup>5/</sup> Viacom, however, had not filed such a petition for reconsideration; in the MO&O, the FCC ruled on the pending petitions for reconsideration filed by other parties.

Although this Court ultimately vacated its September 27 ruling, nothing prevents this Court from once again reconsidering its jurisdiction with respect to the FCC's denial of Viacom's pioneer's preference request, notwithstanding the fact that Viacom has not asked the FCC for reconsideration of that action. Hence, out of an abundance of caution, Viacom is filing this Petition for Review with respect to the MO&O, in order to fully preserve (to the extent necessary) its right to secure judicial review of the FCC's denial of Viacom's pioneer's preference request.

#### FACTS ON WHICH VENUE IS BASED

This Court is the appropriate venue for this action under 47 U.S.C. § 402(a) and 28 U.S.C. § 2343.

#### GROUND ON WHICH RELIEF IS SOUGHT

1. The FCC's action denying Viacom's request for a pioneer's preference for a PCS license was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, and contrary to established FCC precedent. In

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<sup>5/</sup> American Personal Communications v. FCC, No. 84-1549 (filed

particular, the FCC did not adequately explain why the proposals of the three successful applicants are entitled to a pioneer's preference but the proposal of Viacom is not.

2. The FCC misapplied its own criteria in denying Viacom's pioneer's preference request. Specifically, the FCC had stated that proposals that promise to enable the sharing or co-use of allocated spectrum may qualify for a pioneer's preference, yet denied Viacom's request even though it proposed an innovative spectrum-sharing methodology.

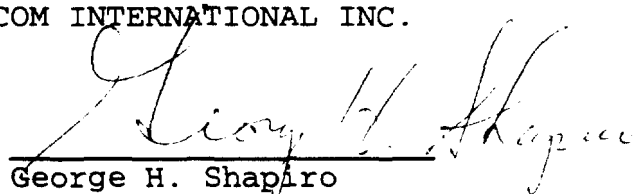
STATEMENT OF REQUESTED RELIEF

Viacom requests that this Court vacate the FCC's denial of Viacom's pioneer's preference request and remand that decision to the FCC for further proceedings, and grant such other and further relief as may be just and proper.

Respectfully submitted,

VIACOM INTERNATIONAL INC.

By:

  
George H. Shapiro

By:

  
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Its Attorneys

January 30, 1995